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[2022] PBRA 1

Application for Reconsideration by Leigh

Application

1. This is an application by Leigh (the Applicant) for reconsideration of a decision of an oral hearing panel which, on 14 November 2021, after a hearing on 8 October 2021, decided not to direct his release on licence.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These are the 271 page dossier provided by the Secretary of State including the written reasons for the decision, the Panel Chair's handwritten notes of the evidence, the application for reconsideration and an email on behalf of the Secretary of State.

Background and current parole review

4. The Applicant is now aged 42. On 6 April 2018, when he was aged 38, he received an extended sentence for sexual assault, comprised of 30 months custodial element and 30 months extended licence. The index offence involved him attacking a female university student in the street one evening. He was found guilty after trial. The sentence expires in April 2023.

5. The Applicant had a history of sexual offending including convictions for indecent exposure, indecent assault and rape. He also had other previous convictions including offences of violence, weapons, theft and threatening behaviour.

6. A Parole Board panel reviewed the Applicant's case at oral hearing on 9 July 2020 but decided not to direct release. He was therefore released at the automatic release point on 6 October 2020, but his licence was revoked on 11 January 2021 after he breached his licence conditions, including the condition to be of good behaviour. This was his first review by the Parole Board following his recall.

7. The case was directed to an oral hearing after consideration by a Parole Board member as part of the member case assessment process. The oral hearing took place on 8 October 2021. The oral hearing panel heard evidence from the Applicant, his Prison Offender Manager (POM) and his Community Offender Manager (COM). The Applicant was legally represented throughout the hearing. The Secretary of State was not formally represented.

Request for Reconsideration

8. The application for reconsideration, dated 6 December 2021, was submitted by the Applicant's legal representative.

9. The Applicant seeks reconsideration on the following four grounds;

   Ground 1. The decision as irrational for not following the unanimous recommendations from witnesses.

   Ground 2. The decision was irrational as it included evidential errors and misrepresented the evidence in the written decision reasons.

   Ground 3. It was irrational to conclude that there was no internalised reduction in risk.

   Ground 4. It was procedurally unfair not to have sought a psychological risk assessment in the circumstances.

The Relevant Law

10. The reconsideration mechanism is not a process where I am required to indicate whether, or not, I might have reached the same or a different conclusion from that reached by the Panel.

Parole Board Rules 2019

11. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

Irrationality

12. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

   "the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

13. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

14. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

15. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

16. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship".*

Procedural unfairness

17. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

18. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:
(a) express procedures laid down by law were not followed in the making of the relevant decision;
(b) they were not given a fair hearing;
(c) they were not properly informed of the case against them;
(d) they were prevented from putting their case properly; and/or
(e) the panel was not impartial.

19. The overriding objective is to ensure that the Applicant's case was dealt with justly.

The reply on behalf of the Secretary of State

20. The Secretary of State confirmed by way of email dated 14 December 2021 from PPCS on his behalf that he did not wish to make any representations in response to the application.

Discussion

Ground 1

21. Although I am allowing the application on Ground 2, I consider it to be necessary to outline the response to Ground 1, given its importance.

22. Here the Applicant submits that, whilst it is accepted that the panel was not bound by the recommendations, it was irrational to disregard the opinion of the POM and the limited consideration for the unanimity of the recommendations was irrational. He submits that the panel stated in its reasons that the POM placed too much reliance on the lack of reoffending in the community and that was why it rejected her recommendation, but the Applicant argues that the POM's recommendation did not solely rely on that and the Applicant lists a further 10 factors which were cited by the POM.

23. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in the cases of **Wells [2019] EWHC 2710 (Admin)** and **Stokes [2020] EWHC 1885 (Admin)** both of which contain helpful guidance which I am bound to follow on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional and other expert witnesses can be regarded as irrational.

24. It is suggested in **Wells** that rather than ask "*was the decision being considered irrational?*" the better approach is to test the ultimate conclusions reached by a panel against all the evidence it has considered and ask whether the conclusions reached can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.

25. Panels of the Board are wholly independent and are not obliged to adopt opinions and recommendations of professional witnesses. It is the responsibility of a panel, whose members will have acquired considerable experience in the assessment of risk, to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence presented to it and to decide what evidence they are able to accept and what evidence they cannot accept.

26. Having reached conclusions upon the evidence it is clear that a panel is then required to explain its reasons, especially if they are going to depart from the recommendations made by experienced professionals. A panel can rationally depart from expert evidence, but a rational explanation for doing so must be given and it must ensure as best it can that its stated reasons are sufficient to justify its conclusions. It follows that I must decide whether on a reading of the Panel's decision, I am satisfied that the conclusions it reached are justified by the evidence they considered, and secondly whether I am satisfied that those conclusions are adequately and sufficiently explained or whether there are any unexplained evidential gaps or leaps in reasoning which fail to justify the conclusion that is reached.

27. I have carefully considered the written reasons in this case. In section 2, the panel details the evidence given by the POM and during that summary, the panel indicates matters where it disagrees. This covered many of the points raised by the Applicant including good behaviour in custody (paragraph 2.2-2.4) and the work completed in custody where the panel disagreed that sufficient work had been completed (paragraph 2.7-2.9). The panel also detailed matters which arose in the community and why it differs to the POM in analysis of those issues. The panel did say that the POM appeared to place a disproportionate amount of weight on the lack of reoffending when explaining that the POM disagreed with the risk assessment in the probation risk assessment report, an opinion the panel did not accept.

28. Furthermore, continuing on in section 2 of the written reasons, the panel went on to explain its concerns regarding the recommendation from the COM. The panel also described evidence from the Applicant and made an assessment of him which it placed weight on with regards to whether it accepted the recommendations (paragraphs 2.29-2.31). In section 4, the conclusion, the panel states that it did not accept the recommendations for the reasons explained and details its conclusion that the risk the Applicant poses is imminent and unmanageable in the community.

29. Thus, I am satisfied from the written reasons that the panel based its assessment on the evidence it heard and the panel has sufficiently explained its reasoning throughout. However, the caveat to this is that one of the conclusions drawn from the evidence of the Applicant appears to have been predicated on a mistake by the panel and that matter is dealt with below.

Ground 2

30. The Applicant submits that evidential mistakes were made and the panel misinterpreted evidence. As detailed in paragraph 15 above, it is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. In order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

31. The Applicant submits that the panel was mistaken in saying that the Applicant knowingly breached a non-contact condition when in custody. The Applicant submits that this was a misinterpretation of the evidence from the POM who actually stated that there was no such condition in existence and it was an administrative error on behalf of the prison. The panel covered this part of the evidence at paragraph 2.2 of its decision and quoted from the evidence of the POM. The recording of the hearing was not available due to technical issues and so I looked at the Panel Chair's notes on this aspect of the evidence and they accord with the quote given in the decision, namely that contact was "*subsequently approved*". It would seem that the interpretations differ rather than there was a misinterpretation by the panel. Therefore I am not satisfied that there was any mistake. In any event, it is clear from the rest of the decision that far more weight was placed on other matters as the main reasons for the decision.

32. The Applicant also submits that there is a mistake in paragraph 2.26 of the written reasons, namely the panel stating that the Applicant "*dropped out*" of an intervention to address sex offending about 10 days before it was completed. This appears to be a misinterpretation by the panel of a psychological report completed before release in January 2020 where the psychologist noted that the Applicant was "*voicing plans to discontinue [the intervention]*" 10 days before completion. In making this submission, the Applicant's legal team make a mistake themselves by stating that the intervention was completed on 10 January 2021 when in fact it was 2020. Whilst I accept there appears to be a misinterpretation I do not find that this was fundamental as the panel made repeated references to the intervention having been completed in other parts of the decision (see for example paragraphs 2.25 and 2.26) and so it is clear to me that it took into consideration the work completed prior to release as well as the developments following release and recall.

33. It is one of the other 'mistakes' referred to in the application where there is merit in the submission in my view. The Applicant submits that there was a mistake at paragraph 2.30 of the decision where the panel referred to domestic abuse which is not a feature of the Applicant's offending. From the information in the dossier it is correct that the Applicant does not have that history and the panel did not outline any other allegations in addition to the written information. His offending was against women who were not known to him. The difficulty arises with this particular mistake as the panel linked its findings that he "*exhibits poor insight and responsibility taking, poor perspective taking and a lack of consequential thinking and problem solving skills*" with the failure to recognise the impact on children of "*domestic abuse*". Given the lack of convictions and allegations in this regard, it would seem to be entirely unfair to form that conclusion. It may be that the panel meant his other offending and the impact it has on children when a parent offends or that the panel was referring to his relationship with a women assessed to be vulnerable, but without further explanation within its decision, it appears to be a mistake. I further conclude that the mistake was fundamental to the decision in that it led to an irrational conclusion about an important aspect of his risk reduction, which was a material part of the panel's decision as evidenced by its written reasons.

34. Consequently, this ground succeeds.

Grounds 3 and 4

35. Given my finding above, I do not propose to deal with these submissions in any detail as it is unnecessary. However, I do not consider that either of them would have succeeded.

Decision

36. Accordingly, applying the test as defined in case law, I conclude that the decision was irrational. I do so solely for the reasons set out above in relation to Ground 2. The application for reconsideration is therefore granted.

Cassie Williams
7 January 2022